

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 7271 of 1999

For Approval and Signature:

Hon'ble MR.JUSTICE A.L.DAVE

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1. Whether Reporters of Local Papers may be allowed : YES  
to see the judgements?
  2. To be referred to the Reporter or not? : YES
  3. Whether Their Lordships wish to see the fair copy : NO  
of the judgement?
  4. Whether this case involves a substantial question : NO  
of law as to the interpretation of the Constitution  
of India, 1950 of any Order made thereunder?
  5. Whether it is to be circulated to the Civil Judge? : NO

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SALIMKHAN @ CHHOTE JABBAR HANIFKHAN PATHAN

Versus

STATE OF GUJARAT

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Appearance:

MR MM TIRMIZI for Petitioner

MR HH PATEL, AGP, for Respondent No. 1, 2, 3

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CORAM : MR.JUSTICE A.L.DAVE

Date of decision: 14/12/1999

ORAL JUDGEMENT

1. The petitioner who is a detenué under PASA challenges the order of detention, passed by Commissioner of Police, Ahmedabad city, Ahmedabad on 24th April 1999 in exercise of powers u/s 3[1] of the Gujarat Prevention of Anti Social Activities Act, 1985 [hereinafter referred

to as 'the PASA Act', for short].

2. Before proceeding to the facts of the case, certain material facts in the background need to be stated at the outset. The petitioner was originally detained on 13th March, 1999, by virtue of an order passed by Commissioner of Police, Ahmedabad city, Ahmedabad in exercise of powers u/s 3[1] of the PASA Act. The said order came to be revoked by the Government, by order dated 26th April 1999, which runs as under :-

"In exercise of the powers conferred by sub-section [1] of section 15 of the Gujarat Prevention of Anti Social Activities Act, 1985 [Gujarat Act No.16 of 1985], the Government of Gujarat hereby revokes the detention order No. PCB/DTN/PASA/93/1999 dated 13/3/99 made by the Commissioner of Police, Ahmedabad city under sub-section [1] of section 3 of the said Act and directs that the person known as Salimkhan Chhotejabbarkhan Hamidkhan Pathan shall be released from detention forthwith unless he is required to be retained in jail under the order of any competent court of law."

On that very day, the present order, which is challenged by this petition, came to be passed. The petitioner was served with grounds of detention and committal order.

3. The petitioner preferred this petition on 22nd September 1999, wherein an order issuing rule and directing the office to place the matter for final hearing in seriatim according to the date of detention was passed on 24th September 1999. The petitioner, later on preferred Civil Application No.13350/99 in this Special Civil Application on 22nd November 1999. The application was for indulgence of the Court for fixing the matter alongwith Special Civil Application No.7264/99. It was brought to the notice of the Court that, although the order of detention indicates the date of detention as 26/4/99, in fact the petitioner is under detention since 13/3/1999. The Court, therefore, passed an order on 29th November 1999 to the effect that Special Civil Application No.7271/99 be placed on Board at Srl. No.172[A], considering the date of detention as 13th March 1999. The matter is, thus, taken up for final hearing.

4. The grounds of detention indicate that the detaining authority took into consideration two IPC cases

registered against the petitioner vide Dani Limada police station Cr.R. No. 104/98 and 35/99. The authority also took into consideration prohibition cases vide Dani Limada Cr.R. No. 5103/97, 5109/97, 5110/97 and 5048/98. The authority has taken into consideration, the statements of certain witnesses in these cases, besides the statements of two anonymous witnesses, whose identity has not been disclosed in exercise of privilege u/s 9[2] of the PASA Act. The authority considered that the fear expressed by the witnesses qua the detainee is genuine and the facts stated in the statements are correct. The grounds of detention indicate that the authority has placed reliance on the subjective satisfaction arrived at by his predecessor in office and then exercised powers u/s 9[2] of the PASA Act. The authority considered possibility of resorting to less drastic remedies and ultimately, came to a conclusion that, since the petitioner is required to be immediately prevented from continuing his illegal and anti social activities, only remedy is to resort to the provisions of the PASA Act. The authority has stated in the grounds of detention that, earlier in the year 1996, the petitioner was detained on 21st June 1996. The said order was subsequently quashed by the High Court. Copies of these papers are supplied to the detainee, but the same is not considered while passing the order by the authority, but it is only mentioned with a view to indicate the criminal antecedents of the detainee. It is also stated that the earlier order dated 30th March 1999 detaining the detainee was revoked by the Government on 26/4/99 due to technical defects. Ultimately, the order came to be passed.

4. The petitioner challenges the detention mainly on following grounds :-

[a] The order is passed on the same grounds on which the earlier order dated 13th March, 1999, was passed and was revoked by the Government. There are no fresh grounds for passing this order and the order is, therefore, bad.

[b] The detaining authority has taken into consideration the earlier order of detention, which it could not have done because the same was quashed by the High Court.

[c] The powers u/s 9[2] of the PASA Act are exercised in absence of subjective satisfaction of the Detaining Officer only on basis of a subjective satisfaction arrived by the predecessor in office of the detaining officer.

Therefore, the order is bad. The petition may be allowed by quashing the order of detention.

5. The detaining authority has filed affidavit in reply. The crux of the affidavit is that the order was passed after carefully scrutinizing, examining and studying and considering the materials placed before the authorities and on personally verifying the genuineness, correctness and veracity of the incidents narrated in the statements of the witnesses in respect of unregistered offences and after satisfying itself that the fear expressed and apprehension shown by the witnesses, is quite real, proper, genuine and reasonable. This satisfaction was arrived at after applying mind to the facts of the case.

6. Mr. Tirmizi, learned advocate appearing for the petitioner has reiterated the above grounds stated in the petition. He submitted that the earlier order was revoked by the Government. On that very day, subsequent order is passed without permitting the petitioner to get out of earlier detention. The subsequent order is passed in total absence of fresh grounds. He submitted that the authority has taken into consideration the previous detention order, which was revoked by the High Court. He submitted that, although the authority has stated in the grounds of detention that order is not taken into consideration while passing the order, the very fact that it is mentioned in the order and that copies relating to that order and its quashing by the High Court, are supplied to the petitioner, indicate that the detaining authority had these aspects in mind, while passing the order and therefore, the order stands vitiated. He pressed into service the decision in the case of Chhagan Bhagwan Kahar v/s N.L.Kalna and others reported in AIR 1989 SC 1234. He also pressed into service decision of a Division Bench of this High Court rendered in Special Criminal Application No.1705/92 rendered on 6th August 1993 [Coram : S.D.Shah & R.D.Vyas, JJ]. He submitted that the petition may be allowed by quashing and setting aside the order of detention.

6. Mr.H.H.Patel, learned AGP has opposed this petition. He submitted that, if provisions of section 15 sub-section [2] of the PASA Act are considered, the authority was empowered to pass this order, only the period of detention would extend upto expiry of one year from the date of earlier detention and therefore, there is no defect in the order. He submitted that the order is passed after taking into consideration various

relevant factors in public interest and the Court may not interfere. Mr.Patel submitted that the authority has not taken into consideration the previous detention order and this fact is unequivocally stated in the grounds of detention and therefore, the order does not suffer from any defect. As regards the need for fresh grounds for passing the subsequent order of detention, he submitted that section 15[2] of the PASA Act, does not require fresh grounds and therefore, the order suffers from no defect and the petition may, therefore, be dismissed. Mr.Patel relied on decision in case of Shaukatali Shabbasali v/s State of Gujarat and another reported in 1987 [1] GLH 518 and submitted that fresh order of detention can be passed after revocation of earlier detention order on the same grounds, as held by the High Court.

7. Adverting to the rival side contentions, the first and foremost defect that is found in the impugned order is that, it is not based on any fresh ground, which may have arisen after the revocation of the earlier order. In fact, undisputedly the petitioner was not allowed to leave the jail and the impugned order of detention was served on him while he was under detention itself. In this regard, judgement of the Supreme Court, in the case of Chhagan Bhagwan Kahar [supra], relied upon by Mr. Tirmizi is to be considered. The Apex Court in para 12 in the said decision has observed as under :-

"12. It emerges from the above authoritative judicial pronouncements that even if the order of detention comes to an end either by revocation or by expiry of the period of detention there must be fresh facts for passing a subsequent order. A fortiori when a detention order is quashed by the Court issuing a high prerogative writ like habeas corpus or certiorari the grounds of the said order should not be taken into consideration either as a whole or in part even alongwith the fresh grounds of detention for drawing the requisite subjective satisfaction to pass a fresh order because once the court strikes down an earlier order by issuing rule, it nullifies the entire order".

"It emerges from the above authorities that even if the order of detention comes to an end either by revocation or by expiry of the period of detention, there must be fresh facts for passing

subsequent order. A fortiori when a detention order is quashed by the court issuing a high prerogative writ like habeas corpus or certiorari the grounds of the said order should not be taken into consideration either as a whole or in part even alongwith fresh grounds of detention for drawing the requisite subjective satisfaction to pass fresh order because once the Court strikes down an earlier order by issuing rule, it nullifies the entire order. [Emphasis supplied].

8. It is, therefore, clear that even where the order of detention comes to an end by revocation [as is the present case], there must be fresh facts for passing such subsequent order. In the instant case, there are no fresh grounds considered by the detaining authority. This is apparent from the grounds of detention supplied to the detainee in respect of earlier detention as well as the present grounds of detention which are on record of this Court and therefore, in absence of fresh grounds, the subsequent detention order i.e. the impugned order of detention, could not have been passed by the detaining authority and it, therefore, cannot be upheld.

9. An argument is advanced by Mr. Patel that section 15 of the PASA Act empowers the Government to pass such an order. There can be no dispute about this aspect, but provision of Article 22[4] of the Constitution has also to be taken into consideration. For considering these two provisions, they need to be considered. Section 15 of the PASA runs as under :-

15. [1] Without prejudice to the provisions of section 21 of the Bombay General Clauses Act, 1904, a detention order may, at any time for reasons to be recorded in writing, be revoked or modified by the State Government, notwithstanding that the order has been made by an authorised officer.

[2] The expiry or revocation of a detention order [hereinafter in this sub-section referred to as "the earlier detention order" shall not bar the making of another detention order [hereinafter in this sub-section referred to as "the subsequent detention order"] under section 3 against the same person:

Provided that in a case where no fresh facts have arisen after the expiry or revocation

of the earlier detention order made against such person, the maximum period for which such person may be detained in pursuance of the subsequent detention order shall in no case extend beyond the expiry of a period of twelve months from the date of detention under the earlier detention order."

Article 22[4] of the Constitution runs as under:-

22. Protection against arrest and detention  
in certain cases -

[1] xxxxxxxx

[2] xxxxxxxx

[3] xxxxxxxx

[4] No law providing for preventive detention  
shall authorise the detention of a person  
for a longer period than two months  
unless an Advisory Board constituted in  
accordance with the recommendations of  
the Chief Justice of appropriate High  
Court has reported before the expiration  
of the said period of two months that  
there is in its opinion sufficient cause  
for such detention :

Provided that an Advisory Board shall  
consist of a Chairman and not less than  
two other members, and the Chairman shall  
be a serving Judge of the appropriate  
High Court and the other members shall be  
serving or retired Judges of any High  
Court:

Provided further that nothing in this  
clause shall authorise the detention of  
any person beyond the maximum period  
prescribed by any law made by Parliament  
under sub-clause [a] of clause [7].

10. Before proceeding to decide the question raised  
by Mr. Patel, let us see what the Apex Court has said  
while considering these two provisions in Abdul Latif  
Abdul Wahab Shaikh v/s B.K.Jha and another reported in

AIR 1987 SC 725. In para 3, the Court observed as under:-

"The real question for consideration is whether a law may be made providing for successive orders for detention in a manner as to render the protection of Article 22 [4] of the Constitution ineffective? For example, can a fresh order of detention be made every 89th day making it unnecessary to obtain the report of the Advisory Board within 3 months of the detention? That is what it will amount to if the submission of the learned counsel for the State is accepted. It, therefore, becomes imperative to read down sec.15 of the Gujarat Prevention of Anti Social Activities Act, 1985 which provides for making of successive orders of detention so as to bring it in conformity with Article 22[4] of the Constitution. If there is to be a collision between Article 22[4] of the Constitution and section 15 of the Act, S.15 has to yield. But, by reading down the provision, the collision may be avoided u/s 15 may be sustained. So, avoiding the collision course, we hold that if the report of the Advisory Board is not made within three months of the date of detention, the detention becomes illegal notwithstanding that it is within three months from the date of the second order of detention."

11. Now, therefore, it is clear that section 15 has to give way to Article 22[4] of the Constitution of India and therefore, the provision has to be read down accordingly. The argument of Mr. Patel, therefore, does not hold ground and cannot be accepted.

11.1 The decision relied upon by the learned AGP cannot come to the rescue of the respondents since, in that very decision, it has been held after considering the various decisions of the Supreme Court that, powers u/s 15[2] of the PASA Act can be exercised by the Government on fresh grounds, which justified the detention, once the said order of detention is quashed by the High Court. It has further been held that, in view of section 15[2] of the Act, the State Government is entitled to pass another detention order after revoking the earlier detention order, without there being fresh facts. It may also be noted that this decision was rendered by the Division Bench on 19th February 1987 as against the decision of the Apex Court rendered on 16th March 1989 and this Court has, therefore, followed the



decision of the Apex Court rendered in case of Chhagan B. Kahar [supra].

12. In view of the above discussion, the order suffers from the defect of absence of fresh ground in passing a subsequent [present order] by the detaining authority.

13. The order also suffers from another defect namely, consideration of previous detention, which was quashed by this Court.

13.1 Undisputedly, the petitioner was detained by order dated 21st June 1996. The said order was challenged before this Court by Special Civil Application No.6721/96 and this Court, by decision dated 5th November 1996, quashed and set aside the order of detention.

13.2. Now, while passing the present order, the detaining authority has stated as under :-

"In 1996 also, as your activities were found to be dangerous, orders No. PCB/DTN/PASA/ 194 / 96 dated 21/6/96 was passed under Gujarat Prevention of Anti Social Activities Act, 1985 and you were detained thereunder. The said order of detention was quashed by the High Court. The above fact is stated here only to indicate your criminal record and it is not taken into consideration while passing the present order of detention which may clearly be noted. The copies of all the papers relating to 1996 detention are supplied herewith for your information."

13.3 It has been contended on behalf of the petitioner that reference to the earlier detention which is quashed by the High Court would render the order illegal, as it cannot be taken into consideration by the detaining authority. Against this, it is contended by learned AGP that, as specifically mentioned in the grounds of detention, the earlier detention of 1996, has not been considered by the detaining authority while passing the order. It was only by way of a mention of criminal antecedents.

13.4 The argument advanced by the learned AGP cannot be accepted for the reason that, although it is stated by the detaining authority that it has not considered while passing the present order, it is humanly impossible to close a compartment of the mind which has the information

while taking a decision. Thus, this was at the back of the mind of the detaining authority while passing the order and this is reflected in the conduct of the authority when it has supplied the documents relating to the earlier detention of 1996. A very similar situation had arisen for consideration of a Division Bench of this Court in the Special Criminal Application No.1705/92 decided on 6th August 1993 [Coram : S.D.Shah & R.D.Vyas, JJ]. In that case also, the detaining authority had referred to earlier order of detention and stated that the attention of the detainee is drawn to his earlier activities, but is not considered by the detaining authority while passing the order. In order to indicate simply between the order which was considered by the Division Bench and the order under consideration of this Court, it would be proper to quote the order that was under consideration of the Division Bench :-

Please refer the original judgement  
for Gujarati portion. \*\*\*\*\*

14. The Division Bench observed that, in its opinion, a detailed reference to the past activities of the detainee of giving various Cr.R. Numbers of offences, for which the detainee was tried, so as to draw the attention of the detainee to such activities, the detaining authority had permitted itself to be influenced by factors which were not relevant and germane to the exercise of powers.

15. In that case, the question before the Court was whether the authority which has applied its mind to the various cases earlier was required to furnish the copies of the documents in relation to this. The Court held reference to this matter and drawing attention of the detainee to those cases indicated that the authority had taken into consideration those cases and therefore, it was necessary to supply copies of those cases to the detainee. Adopting the same principle here, the detaining authority had applied its mind to an order of detention

which was passed in 1996 and subsequently, quashed by an order of the High Court, as stated above. This factor, therefore, became irrelevant, as has been held by the Apex Court. The Apex Court in para 12 of the decision in case of Chhagan B. Kahar [supra], after discussing the various decisions, held that, "A fortiori when a detention order is quashed by the Court issuing a high prerogative writ like habeas corpus or certiorari the grounds of the said order should not be taken into consideration either as a whole or in part even alongwith the fresh grounds of detention for drawing the requisite subjective satisfaction to pass a fresh order because once the court strikes down an earlier order by issuing rule, it nullifies the entire order." The detention order of 1996, therefore, having been quashed and set aside by the High Court, was nullified and it could not have been referred to by the detaining authority while passing the order, for the reason that, although it has categorically stated that it has not taken into consideration, fact remains that it was at the back of the mind of the detaining authority and may be unwittingly the authority has permitted itself into relying on this irrelevant ground. The detaining authority, by merely stating that reference to the detention order of 1996 is not considered while passing the order, expects court to believe that it has not permitted active portion of its mind to consider the material which was stored in dissection of human mind into such compartment is not possible to be accepted. In this view of the matter, the order gets vitiated on this ground also.

16. At this stage, Mr. Tirmizi does not press for the third ground, namely, defect in subjective satisfaction recorded by the detaining authority.

17. The upshot of the above discussion is that the impugned order suffers from two main defects, namely, [i] consideration of detention order of 1996 which was quashed by High Court and became a nullity i.e. consideration of an irrelevant fact, and [ii] that the detaining authority has passed a subsequent order [the impugned order] of detention, in absence of any fresh grounds therefor, after earlier detention order dated 13th March, 1999, was revoked by the Government.

20. The petition, therefore, deserves to be allowed and is hereby allowed. The impugned order of detention dated 24th April 1999 passed by Commissioner of Police, Ahmedabad city, Ahmedabad, is quashed and set aside. The detenue - Salimkhan @ Chhote Jabbar Hanifkhan Pathan, is ordered to be set at liberty, if not required in any

other case. Rule is made absolute accordingly with no orders as to costs.

[ A.L.DAVE, J. ]

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